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IN THE

Supreme Court of the United States

OCTOBER TERM, 1947

No. 613

FRANK HYNES, REGIONAL DIRECTOR, FISH AND WILDLIFE SERVICE, DEPARTMENT OF THE INTERIOR, *Petitioner*,

v.

GRIMES PACKING CO., KADIAK FISHERIES COMPANY, LIBBY, MCNEILL & LIBBY, FRANK MCCONAGHY & CO., INC., PARKS CANNING CO., INC., SAN JUAN FISHING & PACKING CO., AND UGANIK FISHERIES, INC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the District Court (R. 42-61) is reported at 67 F. Supp. 43. The opinion of the Circuit Court of Appeals (R. 499-514) is reported at 165 F. (2d) 323.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on November 21, 1947 (R. 515). The petition

for a writ of certiorari was filed on February 20, 1948. The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

The questions indicated by Petitioner (Pet., pp. 2-3) do not appear wholly accurate, nor do they indicate the relationship among the several questions involved. A more informative statement, we believe, is as follows:

The Secretary of the Interior, having created an alleged "Indian Reservation" in ocean waters off Karluk, Alaska, has attempted to enforce it by a regulation imposing the penalties and forfeitures of a fishing conservation statute, the White Act, upon anyone who fishes there except Karluk Indians and those to whom those Indians may grant permits. Respondents have enjoined the Regional Director of the Fish and Wildlife Service, who enforces the penalties and forfeitures under the White Act, from enforcing the regulation. The questions presented are:

1. Whether the drastic criminal and forfeiture sanctions of the White Act—the basic fisheries conservation statute for Alaska—may be used to coerce recognition of an Indian reservation alleged to have been created in ocean waters off Karluk.

2. If the first question is answered in the affirmative, whether the regulation establishing an exclusive fishery in designated Indians and their permittees does not violate the basic prohibition against establishment of an exclusive fishery contained in the White Act.

3. If both prior questions are decided against respondents, then whether the Act of May 1, 1936, a

minor, technical amendment to an earlier act, granted to the Secretary of the Interior authority to include Alaskan ocean waters under the jurisdiction of the United States within Indian reservations.

4. Whether the District Court properly granted the relief prayed.

STATUTES INVOLVED

The relevant portions of the statutes involved (Section 2 of the Act of May 1, 1936, c. 254, 49 Stat. 1250, U. S. C., Title 48, Sec. 358a; and Sections 1, 6, 7 and 8 of the Act of June 6, 1924 (White Act), c. 272, 43 Stat. 464, as amended, U. S. C., Title 48, Secs. 221 *et seq.*), of Public Land Order No. 128 of May 22, 1943 (8 F. R. 8557), and of Section 208.23 of the Alaska Fisheries Regulations (Title 50, C. F. R., 11 F. R. 3105 as amended by 11 F. R. 9528) are set out in the Appendix.

STATEMENT

The petition for certiorari does not refer to the findings of fact made by the District Court which, having been approved by the court below, will not be further reviewed here. *United States* v. *O'Donnell*, 303 U. S. 501, 508. Those findings may be summarized as follows:

The seven respondents are corporations or business concerns appropriately qualified to do business in Alaska (R. 24-26). The petitioner, a resident of Juneau, Alaska, was at all relevant times and is now Regional Director for Alaska of the Fish and Wildlife Service of the Department of the Interior, with full power to enforce United States Fishery Laws in Alaska (R. 26).

Each respondent is engaged in the taking and canning of salmon in Alaska and each has had a cannery

on Kodiak Island for from 7 to 24 years, respectively (R. 27-28). There have been salmon canneries on Kodiak Island, however, since before 1900. The value of respondents' canneries ranges from $85,000 to $331,000, and the investment in floating equipment ranges from $45,000 to $220,000 (R. 27, 28, 29). Pre-seasonal expenditures for each company ranged in 1946, a typical year, from $30,000 to $665,000 (R. 28-29); and each before the opening of the season of 1946 transported from 22 to 247 employees to Alaska (R. 28-29). Each also employed from 15 to 120 fishermen (R. 28-29).

Respondents obtain their salmon from an area contiguous to their canneries including the ocean waters embraced in the purported Karluk Reservation as described below (R. 27, 29). There is no available replacement for this source of supply, and without it respondents could not operate their canneries profitably (R. 35).

In May, 1943, Public Land Order 128 (Appendix, *infra*) was signed by the Secretary of the Interior. This Order purported to establish a Karluk Indian Reservation for a vast land area embracing about fifteen miles of the shore line of Shelikof Strait, and including (Par. 2):

> "The area described above and the water adjacent thereto extending 3,000 feet from the shore line at mean low tide * * *."

The Order claimed as its foundation Section 2 of the Act of May 1, 1936 (Appendix, *infra*); the native residents of the land area voted their approval on May 23, 1944 (R. 32).[1] This reservation includes the waters described above in which respondents have fished for

[1] The vote (R. 462) was 46 for, 0 against, with 11 eligible voters absent. In all, 57 adult Indians are concerned in the reservation.

many years (R. 27, 29). From the creation of the reservation in 1944 respondents have challenged its validity and particularly the attempted inclusion of ocean waters (R. 32).

In 1946, Section 208.23(r) (Appendix, *infra*) of the Alaska Commercial Fisheries General Regulations was issued. This section closed to salmon fishing all the waters of the Karluk Reservation as established under Public Land Order 128 and added the following proviso:

> "The foregoing prohibition shall not apply to fishing by natives in possession of said reservation, nor to fishing by other persons under authority granted by said natives (49 Stat. 1250)."

The regulation purports to be based on the White Act of 1924 (Appendix, *infra*), a measure for the conservation of the fisheries of Alaska. Section 6 of the White Act contains enforcement provisions, including seizure of boats, gear and equipment as well as criminal prosecution of violators. Under that Act petitioner has been properly authorized to make those arrests and seizures (R. 33-34).

Since publication of Section 208.23(r) of the Commercial Fisheries Regulations, petitioner has continually threatened, except as restrained by the court below, to seize the fish, boats, and gear of respondents utilized in fishing in the Karluk waters (R. 26-27, 34).

Respondents have at all times insisted that Section 208.23(r) was not authorized by the White Act, because it is patently not a conservation measure and because it plainly violates Section 1 of the White Act, which forbids the granting of any "exclusive or several right of fishery" by granting an exclusive right of fishery to the Karluk Indians and their permittees. They have at

all times urged that the drastic penal and seizure provisions of a fishery conservation statute can in no event be directly employed to enforce an asserted Indian reservation under an entirely different statute.

On the basis of these facts, the District Court found that respondents would suffer a substantial and irreparable loss without an adequate remedy at law if petitioner were to prevent them from fishing in the waters in question (R. 35). Respondents would have to close their Kodiak canneries were their boats, gear and equipment seized (R. 36), and the threat of arrest and imprisonment would have kept their crews out of these waters (R. 36).

On the basis of these Findings of Fact the District Court concluded as a matter of law (R. 39-40) that (1) Public Land Order 128 is invalid insofar as it covers ocean waters; (2) that Section 208.23(r) is null and void; and (3) that a permanent injunction should be granted.

The court below affirmed the decree on November 21, 1947 (R. 515). It held that the Secretary of the Interior was not authorized by Section 2 of the Act of May 1, 1936 to create the reservation in ocean waters below low water mark. The court reviewed the history of non-monopoly policy in Alaskan fisheries; pointed out that the Secretary's action gave 57 adults a complete monopoly (except for such rights as they might sell) in waters which yielded in 1946 almost 4,000,000 salmon; and concluded that neither on policy nor on language could the authorization to the Secretary in the 1936 Act to withdraw "public lands" for reservations be extended to open ocean waters. Further, the court held that Paragraph 208.23(r) is not otherwise valid as a conservation measure, and was a plain violation of the anti-monopoly

provisions of the White Act. Finally, it held that the Secretary of the Interior was not a necessary party (R. 499-514).

On February 20, 1948, the petition for certiorari was filed.

ARGUMENT

Section 208.23(r) of the Regulations, here involved, is one paragraph of the comprehensive regulations for the "protection of the Alaska Commercial Fisheries," issued annually by the Secretary of the Interior pursuant to the White Act of 1924 (Appendix, *infra*). That Act, issued after years of agitation, confers unprecedented powers on the Secretary to issue *conservation* regulations, and to insure that conservation will be effected, it makes violations punishable not only by seizure and confiscation of boats, nets or any other gear, as well as all fish caught in violation, but also by heavy fines and imprisonment. Further to insure conservation, powers of arrest and seizure, comparable to those of a United States marshal, are given to designated employees of the Fish and Wildlife Service.

Yet to prevent any possible abuse of the regulatory powers thus delegated, several specific prohibitions were also written into the White Act, to which all regulations must conform. We believe that Section 208.23(r) is in violation of several of those provisions—those against the creation of monopolies over fishing rights in an area in which fishing is permitted, those against the denial to any citizen of the right to fish wherever fishing is permitted, and those against regulations not general in character.

The court below did not find it necessary to pass on those issues, although they are likewise fatal to peti-

tioner's position. Nor did it pass on the further point, which respondents urged below: that it is wholly improper to make use of the criminal and forfeiture sanctions of the White Act to enforce an administrative determination made under a *different* statute and for a different purpose—more specifically, to make effective purported Indian reservations in ocean waters. This, too, destroys petitioner's case. We contend that on all these grounds—the two just mentioned as well as the invalidity of the proposed reservation, upon which the court below rested its decision—the injunction was properly issued.

Before we deal with these specific issues, however, a word is warranted on the setting of the present case. For many years, through administrative action, the Department of Interior has endeavored to secure for selected Indian tribes or villages of Alaska *exclusive* rights to the *commercial* fisheries of the Territory. (The word "commercial" is important; the right of these natives to fish for personal or family use as food has never been challenged and continues wholly unrestricted. This case does not involve that problem; it concerns the commercial catching of fish for sale.)

Originally, the Department attempted to exclude non-Indian commercial fishing by attempting to recognize administratively asserted exclusive Indian rights based on alleged aboriginal possession of ocean waters. These efforts have never been judicially sanctioned, and in view of the recent decision in *Miller v. United States*, 159 F. (2d) 997 (C. C. A. 9th, 1947), probably never will be.

In 1943, however, the Department took a new tack, by attempting to use a minor 1936 amendment to the Wheeler-Howard Indian Reorganization Act (Appen-

dix, *infra*), to include in this Indian reservation at Karluk, on Kodiak Island, a large segment of ocean waters long used by Indians and non-Indians alike for commercial fishing. Some 57 adult Indians and their families were thus attempted to be given the exclusive right to fish, or on their terms to admit non-Karluk residents to fish, in an area which yields many millions of dollars worth of fish annually. The validity of this attempt was immediately challenged by respondents and others. Yet for two years no effort was made to enforce the asserted reservation by the proper remedies available for any lawfully created Indian reservation. *Cf. Alaska Pacific Fisheries* v. *United States*, 248 U. S. 78 (1918), affirming 240 Fed. 274.

Instead of normal and usual judicial enforcement, then, we have the situation presented in this case—the *in terrorem* method of threats to use the drastic *conservation* sanctions under the White Act to make the alleged reservation effective. It is that final course of conduct which forced respondents to obtain injunctive relief. The decision below, which affirmed the order of the District Court granting such relief, is plainly correct, on several grounds, and in no wise warrants review by this Court.

I.

THE DECISION BELOW IS CLEARLY CORRECT, NOT ONLY FOR THE REASONS GIVEN IN THE OPINION, BUT FOR SEVERAL OTHER REASONS AS WELL

As indicated above, petitioner, in order to prevail in this case, must prevail on *each* of three points. He must demonstrate that it is proper to utilize the *conservation of fishing* sanctions of the White Act to effectuate an Indian reservation. He must show that

even if White Act sanctions are available, that Section 208.23(r)—the regulation here involved—can, in some fashion, be squared with the anti-monopoly and other specific limitations of the White Act. If he prevails on both of those points, he must finally show that the reservation of ocean waters is authorized by Section 2 of the Act of May 1, 1936. We believe he can prevail on none of these points.

A. SECTION 208.23(r) IS INVALID BECAUSE IT PURPORTS TO USE CONSERVATION SANCTIONS TO ACCOMPLISH NON-CONSERVATION PURPOSES.

There is no doubt that the White Act is a *conservation* statute. Section 1 begins "*That for the purpose of protecting and conserving the fisheries of the United States in all the waters of Alaska*", the Secretary may issue regulations. Yet Section 208.23(r) has no reference or application to that purpose. The subsection begins by including in the "closed" area the waters adjacent to the Karluk Reservation, but it then adds—with a statutory reference to an Indian reservation statute, that —

> "The foregoing prohibition shall not apply to fishing by natives in possession of said reservation, nor to fishing by other persons under authority granted by said natives. (49 Stat. 1250)"[2]

By no stretch of the imagination can this be deemed conservation. This regulation is no more than a designation of who may fish, and a subdelegation of author-

[2] After suit was filed, the regulation was amended (11 F. R. 9528) by adding: "Such authority shall be granted only by or pursuant to ordinance of the Native Village of Karluk, approved by the Secretary of the Interior or his duly authorized representative."

ity as to who may decide how many men may fish. It is not related to vessels, gear or catch. It neither prohibits nor limits fishing. Although petitioner, in his brief below, made a half-hearted attempt to distill out a conservation purpose, the petition here apparently recognizes the fallacy of that argument, and does not even claim that conservation is a basis for the challenged section. As the court below stated (R. 501):

> "The regulation has no other purpose than to create the Indians' monopoly on the supposition that an Indian reservation in fact has been created and that the Secretary has a right to permit the Indians to fish there and deny the right to all other fishermen not so licensed."

Plainly, therefore, the regulation, which attempts to use White Act *conservation* sanctions to enforce an alleged Indian reservation must fall. Had Congress wished to punish trespass on an Indian reservation by sanctions of forfeiture, fines and imprisonment, it would have said so. It has not. "To supply omission transcends the judicial function." *Iselin* v. *United States*, 270 U. S. 245, 251. More specifically, as the Court stated in *United States* v. *Evans*, No. 15, October Term, 1947, decided March 15, 1948: "In our system, so far at least as concerns the federal powers, defining crimes and fixing penalties are legislative, not judicial, functions." See also *L. P. Steuart & Bro.* v. *Bowles*, 322 U. S. 398, where the Court stated (at p. 404):

> "We agree that it is for Congress to prescribe the penalties for the laws which it writes. It would transcend both the judicial and administrative function to make additions to those which Congress has placed behind a statute."

B. SECTION 208.22(r) IS INVALID BECAUSE IT IS IN CLEAR VIOLATION OF SECTION 1 OF THE WHITE ACT.

Section 1 of the White Act requires, *inter alia*—

> "that every such regulation made by the Secretary of the Interior shall be of general application within the particular area to which it applies, and that no exclusive or several right of fishery shall be granted therein, nor shall any citizen of the United States be denied the right to take, prepare, cure or preserve fish or shellfish in any area of the waters of Alaska where fishing is permitted by the Secretary of the Interior."

That language is not ambiguous. It has not been repealed or modified. It is, indeed, the heart of the Act, as its legislative history shows. H. Rep. No. 357, 68th Cong., 1st Sess., p. 2. Yet measured against these requirements, the challenged regulation cannot stand. It is not of general application: an area is first closed completely, then opened for Karluk Indians and those they may temporarily license for fee or any other conditions they may care to impose. Conversely, it denies to citizens of the United States the right to take fish in waters where fishing is permitted: here only Karluk Indians (and their "permittees") may fish. Finally, the regulation necessarily results in an exclusive right of fishing: a more perfect monopoly could scarcely be devised than one which permits, in an area otherwise closed, one group alone to fish and to license others to do so on their own terms.

Petitioner, indeed, does not deny the conflict, but attempts rather to excuse it by the argument that the anti-monopoly provisions are not applicable to "Indian fisheries". Reference is made both to legislative history and to administrative practice. Neither, in point of fact, support the petitioner's conclusion.

Legislative history.—The White Act was passed as a result of widespread dissatisfaction with the system of so-called "fishery reservations" which had been created by executive orders in the early 1920's, and in which fishing was permitted only to designated individuals or companies. See H. Rep. No. 357, 68th Cong., 1st Sess., p. 2. The anti-monopoly provisions of Section 1 of the Act were designed to forbid this practice in the future; conservation was to be achieved by limitations on season, on places for fishing, and on type of gear, but not by permitting only certain persons to fish to the exclusion of all others. It was designed to forbid, in other words, *exactly* what Section 208.23(r) attempts to do.

There is nothing in the legislative history of that Act which indicates an intention to exempt Indian fisheries from its operation. Indeed, its language is specifically to the contrary: "nor shall *any citizen* of the United States be denied the right to take * * * fish * * * in any area of the waters of Alaska where fishing is permitted." Congress did not prohibit one exclusive right in favor of another. The Indians would benefit, because they could fish where anyone else could fish, and they were of course in favor of the bill. They did not seek, however, and they were not accorded, any exclusive rights of their own.

The petition refers (p. 18) to an exception in favor of Indians in one of the two bills considered when the White Act was in the House Committee (H. R. 4826, 68th Cong., 1st Sess.). The reference is wholly misleading; indeed, it has never been suggested in briefs or arguments in the courts below. Not only was H. R. 4826 not the bill which finally became the White Act, but even in H. R. 4826 the provision to which the peti-

tion refers was only a "grandfather" clause, with no prospective application.[3] The hearings and reports on the White Act contain no discussion of this provision. Even if it had been included in the White Act, it would not have authorized Section 208.23(r); those Karluk waters have been fished by both Indians and non-Indians for over a century. This faint attempt to use unrelated legislative history to reach a result squarely in the teeth of the Act itself is evidence of the flimsy foundation upon which the whole of petitioner's argument rests.

Administrative construction.—Nor is the case for administrative construction any better. One may doubt that a positive prohibition may, under any circumstances, be avoided by "administrative interpretation". In any case, no such administrative interpretation exists. The argument seems to rest (Pet. p. 18) on the fact that the announcements of the Department of Commerce in 1924 quoted the Act of Congress and the Executive Order establishing the Annette Island Indian Reservation, and the Executive Orders establishing a few other Indian reservations. This is disingenuous: the announcements did not in any way relate these Executive Orders to the regulations issued under the White Act.

Moreover, the argument is misleading. The fact is, that *except by special statute* at the Annette Islands, no Indian or Eskimo reservation in Alaska has ac-

[3] The clause in H. R. 4826 was as follows: "*Provided further*, that this provision [forbidding an exclusive right of fishery] shall not affect any right exercised by the descendants of the aboriginal people of Alaska or those of the half blood who are descendants of the aborigines which were exercised and claimed up to the passage of this act."

corded any exclusive or special right of commercial fishery. The Afognak Forest and Fish Culture Reserve, for example, to which petitioner refers (p. 19) did not grant an exclusive fishing right to the Indians; it simply prohibited *all* fishing. See Proclamation No. 39 of December 24, 1892, 27 Stat. 1052. The fish hatchery there was abandoned in the late 1920's, however, and since 1929 the Afognak waters have simply been subject to the general commercial fisheries conservation regulations. See Bur. Fisheries Doc. No. 1064, pp. 201, 206 (1929). The facts on the other reservations mentioned by petitioner (p. 17n) are either similar to those at Afognak, or do not contain any ocean waters within their boundaries. Certainly no "administrative interpretation"—supporting the establishment of an exclusive fishery under a statute which specifically prohibits just exactly that—can be gleaned from a reserve in which no one could fish until 1929, and all were permitted equal fishing rights thereafter.[4]

To sum up: In 1922 the Government began a fishing reservation and permit system, without statutory sanction. By 1924 Congress, reflecting the widespread dissatisfaction with the device, forbade it by the flat prohibitions of Section 1 of the White Act. Now it is proposed to recreate the old reservation and permit system, with but two differences: (a) under the new program, the permittee must pay a tax to the Indians

[4] The Tyonek reservation to which petitioner makes particular reference (p. 17) is a reservation of *land area only*. See Exec. Order No. 2141, dated February 27, 1915. The decision of the Solicitor of the Interior Department (49 L. D. 592) to which petitioner makes reference as showing a lease of fishing privileges (p. 17) has primary reference to a cannery site; fishing privileges, in view of the extent of the reservation, must have referred to the Chuit River, which flows through the reservation.

and meet their other conditions to get the permit, which was not required under the old system; and (b) under the new program, permits are granted and are revocable on the signature of a Karluk Indian, rather than of the Secretary.

We do not believe that the permit system 1947 style would have pleased Congress any more than the 1922-1923 model. Whether it might or not, all exclusive rights were specifically prohibited by the White Act. The "exclusive rights" permit system cannot, by changes of detail, be legally resurrected after its careful, considered, and unqualified Congressional interment in 1924.

C. MOREOVER, AS THE COURT BELOW HELD, THE PURPORTED RESERVATION OF OCEAN WATERS IS INVALID.

Not only must petitioner prevail on the two issues just discussed in order to sustain Section 208.23(r), but he fails in any event unless he also prevails on the issue decided against him by the court below. That court, and the District Court, have held that the Act of May 1, 1936 (Appendix, *infra*), did not authorize the creation of a reservation in ocean waters. The lower courts are clearly correct.

Section 2 of the 1936 Act, upon which petitioner relies for authority to include ocean waters in the Karluk Indian reservation, is as follows:

> "That the Secretary of the Interior is hereby authorized to designate as an Indian reservation *any area of land* which has been reserved for the use and occupancy of Indians or Eskimos by section 8 of the Act of May 17, 1884 (23 Stat. 26), or by section 14 or by section 15 of the Act of March 3, 1891 (26 Stat. 1101), or which has been heretofore reserved under any executive order and placed under the jurisdiction of the Department of the

Interior or any bureau thereof, *together with additional public lands adjacent thereto*, within the Territory of Alaska, or *any other public lands* which are actually occupied by Indians or Eskimos within said Territory: *Provided*, That the designation by the Secretary of the Interior of *any such area of land* as a reservation shall be effective only upon its approval by the vote, by secret ballot, of a majority of the Indian or Eskimo *residents thereof* * * * *Provided further*, That nothing herein contained shall affect any valid existing claim, location, or entry under the laws of the United States, whether for homestead, mineral, right-of-way, or other purpose whatsoever, * * *." (Italics supplied.)

The issue is whether these several references to "public lands" or "area of land" mean not only land, but ocean waters. We do not doubt, of course, the power *of Congress* to include ocean waters in an Indian reservation; indeed, on rare occasions, it has done so. *Cf. Alaska Pacific Fisheries v. United States*, 248 U. S. 78. Here, not only the language of the 1936 Act, but also its legislative history deny petitioner's claim that Congress delegated that power to the Secretary of the Interior.

Even were the words of Section 2 not "public lands" but simply "lands", we believe that the decisions of this Court indicate that it would not grant to the Secretary the claimed unlimited power to reserve ocean waters. Congress has *never* disposed of lands under the ocean by *general* laws such as this; each such occasion has been by particular Congressional action. *Shively v. Bowlby*, 152 U. S. 1, 57. And even when Indian rights are concerned, "land" does not mean submerged land; as this Court has said, disposals of submerged land by the United States during the territorial period "should not be regarded as intended

unless the intention was definitely declared or otherwise made very plain." *United States* v. *Holt State Bank*, 270 U. S. 49, 55. There is certainly no definite declaration here—quite the contrary, in fact—and there is not even a scintilla of evidence that Congress meant by the 1936 Act to authorize the Secretary of the Interior in his discretion to make any or all of the northern Pacific ocean into Indian reservations.

Moreover, as the court below points out, the reference here is not only to "lands" but to "public lands". That phrase had been construed for over a half century to exclude ocean waters. *Mann* v. *Tacoma Land Co.*, 153 U. S. 273, 284; *Newhall* v. *Sanger*, 92 U. S. 761, 763. This Court had so construed it no more than six months before the 1936 Act was passed. *Borax Consolidated, Ltd.* v. *Los Angeles*, 296 U. S. 10, 17. Congress undoubtedly intended in the May 1, 1936 Act that the phrase "public lands" would have its normal meaning.

Petitioner cites no decision to the contrary. His most persuasive argument (Pet. p. 18) is that in two decisions (*Alaska Gold Recovery Co.* v. *Northern M. & T. Co.*, 7 Alaska 386, 398 (1928); and *Dow* v. *Ickes*, 123 F. (2d) 909, 914 (App. D. C. 1941), *certiorari denied*, 315 U. S. 807) the opinions refer to ocean waters, and the lands submerged beneath them, as "public *domain*". No doubt "public domain" is a broader concept; were that the language of the 1936 Act, we should have a different question. The 1936 Act, however, deals with "public *lands*."

Petitioner also refers (p. 11) to one statute—the Act of March 3, 1891 (c. 561, 26 Stat. 1095)—in which, he asserts, the context shows that the phrase "public lands" was there intended to include ocean waters. It

is difficult to see how this statute, passed almost 50 years ago, can be said to be in *pari materia*, as petitioner asserts (p. 11), particularly since the section of it on which petitioner bases his argument was repealed only seven years later by the Act of March 14, 1898 (c. 299, 30 Stat. 409). But even in discussing this 1891 Act petitioner errs in asserting that the phrase "public lands" in Section 12 includes ocean waters. The authority to purchase "public lands" in Section 12 was limited to persons "in possession of and occupying public lands"; title to ocean waters never was, and never could be obtained under the provisions of this Act. The provision in Section 14 cited by petitioner (p. 12), requiring all patents issued under Section 12 to reserve the right of the United States to regulate the taking of salmon, undoubtedly was intended by Congress to permit it to protect the salmon runs in the fresh water streams and on the tidelands regardless of the rights of the abutting owners. The provision has not been inserted in any patent issued by the Land Office since the repeal of the 1891 Act in 1898.

But if any conceivable doubt exists as to the meaning of "public lands" in the 1936 Act, it is set at rest by its legislative history. The 1936 Act is an amendment to the Wheeler-Howard Act of 1934 (c. 576, 48 Stat. 984). The Wheeler-Howard Act had as its basic purpose the permitting of an experiment in Indian communal ownership of property under the guidance of the Secretary of the Interior. It conferred no power to create reservations. Section 13 of that Act made certain sections applicable to the Territory of Alaska. As the Secretary of the Interior said in his letter request for the 1936 amendment to the Congress, Section 17 of the Wheeler-Howard Act, which authorized the

incorporation of Indian tribes, had, unintentionally, not been applied to Alaska. He recommended the bill to correct the error. H. Rep. No. 2244, 74th Cong., 2d. Sess., p. 4. When the House Committee on Indian Affairs reported the bill, *without hearings of any sort*, it stated (*id.*, p. 3):

> "This measure merely seeks to allow the Indians of Alaska to participate in the benefits of existing law to the same extent and manner as the Indians of the United States proper, a condition that does not exist now because of what appears to be an unintentional omission in the Wheeler-Howard Act as stated by the Secretary of the Interior * * *."

The only reference to Section 2 of the 1936 Act appearing anywhere in the legislative history is in the letter from the Secretary of the Interior commenting on the bill. He said that lands which should have been segregated for the Indians under the Act of May 17, 1884, and the Act of March 3, 1891, had not been so segregated. His only statement as to the meaning of the section was (H. Rep. No. 2244, *supra*, p. 4):

> "Section 2 of the bill which gives to the Secretary of the Interior power to designate certain lands as Indian reservations is, therefore, a logical sequence of the legislative history regarding Indian lands in Alaska and *provides a method by which the financial aid provisions of the Indian Reorganization Act may be extended to those Indians and Eskimos of Alaska who occupied established villages.*" (Italics supplied)

Nothing appears—literally not a word—which states or even suggests that when Congress used the words "public lands" in Section 2 of this amendment, it had

in mind lands under ocean waters. There was no mention of "fishing" and no reference to "waters" in the Secretary's letter or in the brief House or Senate reports. The 1936 amendment, beyond the shadow of a doubt, was intended by Congress simply to extend to the Indians and Eskimos of Alaska the benefits of the Wheeler-Howard Act.

If petitioner is correct, this seemingly innocuous and undiscussed minor amendment to the Wheeler-Howard Act has given the Secretary of the Interior a power of life and death over the Alaskan salmon industry. There is no limit at all put upon his power, as petitioner interprets it, to include any or all of the fisheries of Alaska within Indian reservations. We submit Congress would not have taken such a step without at least discussing its significance on the floor of the Congress and without giving the industry a chance to be heard. Congress has previously dealt with such legislation only after long hearings and long debate. And justly so, for Alaskan waters produce an annual pack of salmon worth about $90,000,000, which makes it far and away the chief industry of Alaska. The basic fishery statute—the White Act—was passed after the President of the United States personally inspected the situation in Alaska, and after full hearings and long debate.

It is unbelievable that Congress should have accorded to the Secretary of the Interior in this casual manner a *carte blanche*. One would have to believe that Congress had thus cavalierly reversed—without debate, without discussion, without hearing, without reference to the fact that it was doing so—two long established policies, the one against disposing of navigable waters by general legislation, and the other against summary

disposition of Alaskan fishing rights. It is far easier to believe that when Congress used the words "public lands" in the 1936 statute, it means the uplands of Alaska.

The inference which petitioner seeks to create (p. 15) that the 1936 Act was a recognition by Congress that the Alaskan natives needed, and should have, fishing reserves is thus wholly misleading; if the Secretary had that purpose in mind when he transmitted the proposed bill to Congress, it was well concealed. Congress, certainly, had no thought that fisheries were involved at all. Petitioner's reference (p. 16) to *Alaska Pacific Fisheries* v. *United States*, 248 U. S. 78, which interpreted a specific and unique statutory provision in which Congress in 1891 had created on an individual and appealing showing a specific reservation for a specific group of Indians is thus wholly inapposite.

Perhaps the assertion does not warrant an answer, but petitioner is of course in error in implying (p. 15) that unless the Indians have exclusive rights of commercial fishery at Karluk they will go unfed, unclothed, uneducated and indeed unburied. Actually, the Karluk Indians have never had any exclusive right of fishery; the area has been fished for over a century by non-natives and natives alike. See Interior Department, *Report on Population and Resources of Alaska at the Eleventh Census—1890* (G. P. O. 1893), pp. 76, 79; *Salmon and Salmon Fisheries of Alaska* (G. P. O. 1899), p. 144; Marshall McDonald, Commissioner of Fisheries, in *Seal and Salmon Fisheries and General Resources of Alaska* (G. P. O. 1898-1899), Vol. 2, p. 424; *Pacific Steam Whaling Co.* v. *Alaska Packers Ass'n.*, 138 Cal. 632, 72 Pac. 161 (1903). The Karluk natives, as the court below points out (R. 505), have fished on their own account, have been employed as

fishermen on the boats of the fishing companies, and have also worked in the canneries. The court adds (R. 505):

> "There is no evidence that the catch of the white fishermen in the waters sought to be reserved for the Indians in any way lessened the catch of the fifty Indian families or the wages they earned. It is fair to assume that since six hundred odd white fishermen used these waters without interfering with each other, the 57 Indian fishermen would find no greater interference. Indeed, so far as their purchasing power is concerned, it well may be that if was much higher than before the white men established their plants on Kodiak Island."

II.

The decision below is not of general importance or application

So far as we know, Section 208.23(r) is unique; no other attempt has ever been made to enforce, by the severe conservation sanctions of the White Act, compliance with an Indian reservation created under a wholly different statute. Petitioner does not assert that the decision will affect any other sections of the Alaska Commercial Fisheries Regulations.

Petitioner's chief contention that the case is of importance relates to its alleged effect on other reservations (p. 19). Actually, as we have already pointed out, there is no Indian or Eskimo reservation in Alaska which has accorded, or now accords, any exclusive or special right of commercial fishery, under *any* statute, with the sole exception of one reservation created in 1891 *by a special statute*. Certainly the decision does not cast doubt on that reservation, and there is in fact no other commercial fishery reservation to be affected.

STATUTES AND BILLS:

III.

There is no conflict of decisions

Petitioner refers (pp. 19-21) to several decisions with which the decision below is alleged to be in conflict. Even cursory examination indicates that no such conflict exists.

A. One such assertion has already been dealt with—that the decision conflicts with *Alaska Pacific Fisheries v. United States*, 248 U. S. 78. As we have already noted, that case involved a reservation created by a special statute. The considerations which control the interpretation of such a statute have no relevance to the 1936 Act, a general statute. The language construed is not the same. The two decisions are simply not comparable, and certainly are not in conflict.

B. The next conflict alleged is with *Doe v. Ickes*, 123 F. (2d) 909 (App. D. C. 1941), *certiorari denied* 315 U. S. 807. That case rejected an attempt to require the "opening of new sites or additional general areas for fishing". The claim of conflict is based on the assertion that the two paragraphs of Section 208.23(r) can be read separately: that the first paragraph closes the area to commercial fishing, and that even though Karluk natives (and their permittees) are exempted from the prohibition by the second paragraph, this does not mean that respondents may fish without regard to this prohibition.

The fallacy is that the regulation, of course, must be read as a whole; the substance, not the style or typography, determines its validity. Respondents are not seeking an injunction giving them a right to fish in violation of the White Act. They have secured, rather, an injunction in the terms of that Act—an injunction

restraining petitioner from interfering with their fishing in "waters where fishing is permitted by the Secretary under the regulations". That right is specifically guaranteed them by the Act. *Freeman* v. *Smith*, 44 F. (2d) 703, 704 (C. C. A. 9th, 1930).

C. The third asserted conflict is with the line of cases, of which *Perkins* v. *Lukens Steel Co.*, 310 U. S. 113, is an example, to the effect that no action will lie unless a right has been violated. The conflict is wholly illusory, for respondents do claim a right to fish in the area involved. At common law, the public, of which respondents are a part, are entitled to fish in navigable and coastal waters. This right can of course be withdrawn by the state or the United States, but until it is withdrawn—and we may fairly add, validly withdrawn—it is a right. *Shively* v. *Bowlby*, 152 U. S. 1 (1894); *Canoe Pass Packing Co.* v. *United States*, 270 F. (2d) 533, 535 (C. C. A. 9th, 1921); *Pacific Steam Whaling Co.* v. *Alaska Packers Ass'n.*, 138 Cal. 632, 72 Pac. 161, 163 (1903); 22 Am. Jur. (Fish & Fisheries, §§ 10, 11) 673, 674, and authorities there cited.

This common law right, subject to Government revocation, was confirmed by Section 1 of the White Act, which contains the proviso, "Nor shall any citizen of the United States be denied the right to take, prepare, cure, or preserve fish or shellfish in any area of the waters of Alaska where fishing is permitted by the Secretary of Commerce (Interior)." The courts have declared, *Freeman* v. *Smith*, 44 F. (2d) 703, 704 (C. C. A. 9th, 1930), that the White Act gives a right "guaranteed to every citizen of the United States without res[illegible]vation * * *." Respondents deny that the Secretary of Interior has validly withdrawn the permission of the Act.

D. Finally, petitioner suggests that the decision below is in conflict with *Williams v. Fanning*, 332 U. S. 490, since the Secretary of the Interior was not joined as a party defendant. On the contrary, the decisions are wholly consistent. In the *Williams* case the Court held that the Postmaster General was not an indispensable party in a suit against the local postmaster to review a fraud order. The Court's opinion points out that in that case the superior official is not a necessary party "if the decree which is entered will effectively grant the relief which is required by expending itself on the subordinate official who is before the court". Such is the situation here.

CONCLUSION

Wherefore, this petition for a writ of certiorari should be denied.

Respectfully submitted,

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March, 1948.

APPENDIX.

THE WHITE ACT, C. 432, 36 STAT. 331, JUNE 6, 1924, AS AMENDED BY C. 271, 41 STAT. 752, JUNE 18, 1920.

SECTION 1. That for the purpose of protecting and conserving the fisheries of the United States in all waters of Alaska the Secretary of Commerce from time to time may set apart and reserve fishing areas in any of the waters of Alaska over which the United States has jurisdiction, and within such areas may establish closed seasons during which fishing may be limited or prohibited as he may prescribe. Under this authority to limit fishing in any area so set apart and reserved the Secretary may (a) fix the size and character of nets, boats, traps, or other gear and appliances to be used therein; (b) limit the catch of fish to be taken from any area; (c) make such regulations as to time, means, methods, and extent of fishing as he may deem advisable. From and after the creation of any such fishing area and during the time fishing is prohibited therein it shall be unlawful to fish therein or to operate therein any boat, seine, trap, or other gear or apparatus for the purpose of taking fish; and from and after the creation of any such fishing area in which limited fishing is permitted such fishing shall be carried on only during the time, in the manner, to the extent, and in conformity with such rules and regulations as the Secretary prescribes under the authority herein given: *Provided*, That every such regulation made by the Secretary of Commerce shall be of general application within the particular area to which it applies, and that no exclusive or several right of fishery shall be granted therein, nor shall any citizen of the United States be denied the right to take, prepare, cure, or preserve fish or shellfish in any area of the waters of Alaska where fishing is permitted by the Secretary of Commerce. The right herein given to establish fishing areas and to permit limited fishing therein shall not apply to any creek, stream, river, or other bodies of water in which fishing is prohibited by specific provisions of this Act, but the Secretary of Commerce through the creation of such areas and the establishment of closed seasons may further extend the restrictions and limitations imposed upon fishing by specific provisions of this or any other Act of Congress: *Provided further*, That the Secretary of Commerce is hereby authorized to permit the taking of fish or shellfish, for bait purposes

only, at any or all seasons in any or all Alaskan Territorial waters.

It shall be unlawful to import or bring into the Territory of Alaska, for purposes other than personal use and not for sale or barter, salmon from waters outside the jurisdiction of the United States taken during any closed period provided for by this Act or regulations made thereunder.

* * * * * * * * * * *

SEC. 6. Any person, company, corporation, or association violating any provision of this Act or of said Act of Congress approved June 26, 1906, or of any regulation made under the authority of either, shall, upon conviction thereof, be punished by a fine not exceeding $5,000 or imprisonment for a term of not more than ninety days in the county jail, or by both such fine and imprisonment; and in case of the violation of section 3 of said Act approved June 26, 1906, as amended, there may be imposed a further fine not exceeding $250 for each day the obstruction therein declared unlawful is maintained. Every boat, seine, net, trap, and every other gear and appliance used or employed in violation of this Act or in violation of said Act approved June 26, 1906, and all fish taken therein or therewith, shall be forfeited to the United States, and shall be seized and sold under the direction of the court in which the forfeiture is declared, at public auction, and the proceeds thereof, after deducting the expenses of sale, shall be disposed of as other fines and forfeitures under the laws relating to Alaska. Proceedings for such forfeiture shall be in rem under the rules of admiralty.

That for the purposes of this Act all employees of the Bureau of Fisheries, designated by the Commissioner of Fisheries, shall be considered as peace officers and shall have the same powers of arrest of persons and seizure of property for any violation of this Act as have United States marshals or their deputies.

SEC. 7. Sections 6 and 13 of said Act of Congress approved June 26, 1906, are hereby repealed. Such repeal, however, shall not affect any act done or any right accrued or any suit or proceeding had or commenced in any civil cause prior to said repeal, but all liabilities under said laws shall continue and may be enforced in the same manner as if committed, and all penalties, forfeitures, or liabilities incurred prior to taking effect hereof, under any law embraced in, changed, modified, or repealed by this Act, may

IN THE

Supreme Court of the United States

OCTOBER TERM, 1948

No. 24

FRANK HYNES, REGIONAL DIRECTOR, FISH AND WILDLIFE SERVICE, DEPARTMENT OF THE INTERIOR, *Petitioner*,

v.

GRIMES PACKING CO., KADIAK FISHERIES COMPANY, LIBBY, MCNEILL & LIBBY, FRANK MCCONAGHY & CO., INC., PARKS CANNING CO., INC., SAN JUAN FISHING & PACKING CO., AND UGANIK FISHERIES, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR RESPONDENTS

OPINIONS BELOW

The opinion of the District Court (R. 42-61) is reported at 67 F. Supp. 43. The opinion of the Circuit Court of Appeals (R. 499-514) is reported at 165 F. (2d) 323.

be prosecuted and punished in the same manner and with the same effect as if this Act had not been passed.

SEC. 8. Nothing in this Act contained, nor any powers herein conferred upon the Secretary of Commerce, shall abrogate or curtail the powers granted the Territorial Legislature of Alaska to impose taxes or licenses, nor limit or curtail any powers granted the Territorial Legislature of Alaska by the Act of Congress approved August 24, 1912, "To create a legislative assembly in the Territory of Alaska, to confer legislative power thereon, and for other purposes."

ACT OF MAY 1, 1936, c. 254, 49 STAT. 1250.

* * * sections 1, 5, 7, 8, 15, 17, and 19 of the Act entitled "An Act to conserve and develop Indian lands and resources; to extend to Indians the right to form business and other organizations; to establish a credit system for Indians; to grant certain rights of home rule to Indians; to provide for vocational education for Indians; and for other purposes"; approved June 18, 1934 (48 Stat. 984), shall hereafter apply to the Territory of Alaska: *Provided*, That groups of Indians in Alaska not heretofore recognized as bands or tribes, but having a common bond of occupation, or association, or residence within a well-defined neighborhood, community, or rural district, may organize to adopt constitutions and bylaws and to receive charters of incorporation and Federal loans under sections 16, 17, and 10 of the Act of June 18, 1934 (48 Stat. 984).

SEC. 2. That the Secretary of the Interior is hereby authorized to designate as an Indian reservation any area of land which has been reserved for the use and occupancy of Indians or Eskimos by section 8 of the Act of May 17, 1884 (23 Stat. 26), or by section 14 or section 15 of the Act of March 3, 1891 (26 Stat. 1101), or which has been heretofore reserved under any executive order and placed under the jurisdiction of the Department of the Interior or any bureau thereof, together with additional public lands adjacent thereto, within the Territory of Alaska, or any other public lands which are actually occupied by Indians or Eskimos within said Territory: *Provided*, That the designation by the Secretary of the Interior of any such area of land as a reservation shall be effective only upon its approval by

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on November 21, 1947 (R. 515). The petition for a writ of certiorari was filed on February 20, 1948 and was granted on April 5, 1948 (R. 517). The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925 (U. S. Code, Title 28, Section 1254).

QUESTIONS PRESENTED

Petitioner's "Questions Presented" are not only different in form and substance than those which appeared in his petition (see pp. 49-51, *infra*), but are also somewhat misleading. We should state the questions as follows:

The Secretary of the Interior, having included ocean waters off Karluk, Kodiak Island, Alaska, in an "Indian reservation", has attempted to enforce it by a regulation imposing the penalties and forfeitures of a fishing conservation statute, the White Act, upon anyone who fishes there commercially except Karluk Indians and those to whom those Indians may elect to sell permits. Respondents sought, and obtained from the courts below, an injunction against the Regional Director of the Fish and Wildlife Service, who enforces those penalties and forfeitures. The questions presented are:

1. Whether the regulation establishing an exclusive fishery in designated Indians and their permittees violates the basic prohibition against establishment of an exclusive right of fishery contained in the White Act.

2. If the first question is answered in the negative, then whether the drastic criminal and forfeiture sanctions of a commercial fishing conservation statute may be used to coerce recognition of an alleged Indian reservation in ocean waters.

the vote, by secret ballot, of a majority of the Indian or Eskimo residents thereof who vote at a special election duly called by the Secretary of the Interior upon thirty days' notice: *Provided, however*, That in each instance the total vote cast shall not be less than 30 per centum of those entitled to vote: *Provided further*, That nothing herein contained shall affect any valid existing claim, location, or entry under the laws of the United States, whether for homestead, mineral, right-of-way, or other purpose whatsoever, or shall affect the rights of any such owner, claimant, locator, or entryman to the full use and enjoyment of the land so occupied.

PUBLIC LAND ORDER 128, MAY 22, 1943, R. 17, 18.

Alaska

Modifications of Executive Order Designating Lands as Indian Reservation

By virtue of the Authority contained in the Act of June 25, 1910, c. 421, 36 Stat. 847 as amended by the act of August 24, 1912, c. 369, 37 Stat. 497 (U. S. C., title 43, secs. 141-143), and the act of May 1, 1936, c. 254, 49 Stat. 1250 (U. S. C., title 48, sec. 358a), and pursuant to Executive Order No. 9146 of April 24, 1942: It is ordered, as follows:

1. Executive Order No. 8344 of February 10, 1940, withdrawing Kodiak and other islands, Alaska, for classification and in aid of legislation, is hereby modified to the extent necessary to permit the designation as an Indian reservation of the following-described area:

Beginning at the end of a point of land on the shore of Shelikof Strait on Kodiak Island, said point being about one and one-quarter miles east of Rocky Point and in approximate latitude 57° 39′ 40″ N., longitude 154° 12′ 20″ W.;

Thence south approximately eight miles to latitude 57° 32′ 30″ N.;

Thence west approximately twelve and one-half miles to the confluence of the north shore of Sturgeon River with the east shore of Shelikof Strait;

Thence northeasterly following the easterly shore of Shelikof Strait to the place of beginning, containing approximately 35,200 acres.

2. The area described above and the water adjacent thereto extending 3,000 feet from the shore line at mean

low tide, are hereby designated as an Indian reservation for the use and benefit of the native inhabitants of the native village of Karluk, Alaska, and vicinity:

Provided, That such designation shall be effective only upon its approval by the vote of the Indian and Eskimo residents of the area involved in accordance with section 2 of the act of May 1, 1936, *supra*; And provided further, That nothing herein contained shall affect any valid existing claim or right under the laws of the United States within the purview of that section.

HAROLD L. ICKES,
Secretary of the Interior

May 22, 1943

(F. R. Doc. 43-9892; Filed June 19, 1943; 10:58 a.m.)

REGULATION 208.23 (OF WHICH SECTION (r) IS PARTICULARLY RELEVANT).

SEC. 208.23 Waters closed to salmon fishing. All commercial fishing for salmon is prohibited as follows:

(a) Portage Bay, tributary to Alitak Bay: All waters of lagoon at head of southeast arm inside or markers placed at entrance, and all waters in the northeast arm within a line from a marker on the north shore 1 statute mile from the stream in the northeast corner of the bay to a marker on the opposite shore.

(b) Deadman Bay, tributary to Alitak Bay: All waters of Deadman Bay within 1 statute mile of the head of the bay.

(c) Western shore of Kodiak Island: All waters within 1 statute mile of the mouth of Red River.

(d) Karluk River: All waters within Karluk River and within 100 yards of its mouth where it breaks through Karluk Spit into Shelikof Strait.

(e) Uyak Bay: All waters of the bay south of 57 degrees 19 minutes north latitude.

(f) Zachar Bay, tributary to Uyak Bay: All waters of Zachar Bay east of 153 degrees 44 minutes west longitude.

(g) Spiridon Bay (or northeast arm of Uyak Bay): All waters of Spiridon Bay south of 57 degrees 37 minutes 6 seconds north latitude.

times and is now Regional Director for Alaska of the Fish and Wildlife Service of the Department of the Interior, with full power to enforce United States Fishery Laws in Alaska (R. 26).

Each respondent is engaged in the taking and canning of salmon in Alaska and each has had a cannery on Kodiak Island for from 7 to 24 years, respectively (R. 27-28). There have been salmon canneries on Kodiak Island, however, since before 1900. The value of respondents' canneries ranges from $85,000 to $331,000, and the investment in floating equipment ranges from $45,000 to $220,000 (R. 27, 28, 29). Pre-seasonal expenditures for each company ranged in 1946, a typical year, from $30,000 to $665,000 (R. 28-29); and each before the opening of the season of 1946 transported from 22 to 247 employees to Alaska (R. 28-29). Each also employed from 45 to 120 fishermen (R. 28-29).

Respondents obtain their salmon from an area contigious to their canneries including the ocean waters embraced in the purported Karluk reservation as described below (R. 27, 29). There is no available replacement for this source of supply, and without it respondents could not operate their canneries profitably (R. 35).

In May, 1943, Public Land Order 128 (Appendix, *infra*) was signed by the Secretary of the Interior. This Order purported to establish a Karluk Indian Reservation for a vast land area embracing about fifteen miles of the shore line of Shelikof Strait, and including (Par. 2):

> "The area described above and the water adjacent thereto extending 3,000 feet from the shore line at mean low tide, * * *."

(h) East Arm, Uganik Bay, Kodiak Island: All waters within the arm south of a line extending from Mink Point northeasterly to a point on the northeast shore at 57 degrees 43 minutes 20 seconds north latitude.

(i) Terror Bay: All waters within the bay south of 57 degrees 44 minutes north latitude.

(j) Pasagshak Bay, at entrance to Ugak Bay: All waters within the bay.

(k) Ugak Bay: All waters within the bay west of 152 degrees 49 minutes west longitude.

(l) Kiliuda Bay: All waters of the bay west of 153 degrees 7 minutes west longitude.

(m) Old Harbor, Sitkalidak Strait: All waters within 1 statute mile of the mouth of the stream approximately 1 statute mile northeast of Old Harbor, Sitkalidak Strait.

(n) All bays of Afognak Island: All waters of the bays within lines indicated by markers erected for the purpose.

(o) Katlia Bay, on north shore of Shelikof Strait: All waters within 1 statute mile outside the entrance of the outer lagoon.

(p) Little River, west of Cape Ugat: All waters within 1 statute mile of the mouth of the stream.

(q) Kizhuyak Bay: All waters within one-half mile of the mouth of an unnamed stream entering the bay at approximately 57 degrees 49 minutes north latitude.

(r) All waters within 3,000 feet of the shores of Karluk Reservation (Public Land Order No. 128, May 22, 1943), beginning at a point on the east shore of Shelikof Strait, on Kodiak Island, latitude 57° 32′ 30″ N., thence northeasterly along said shore to a point 57° 39′ 40″.

The foregoing prohibition shall not apply to fishing by natives in possession of said reservation, nor to fishing by other persons under authority granted by said natives (49 Stat. 1250). Such authority shall be granted only by or pursuant to ordinance of the Native Village of Karluk, approved by the Secretary of the Interior or his duly authorized representative.

Respondents have at all times insisted that Section 208.23(r) was not authorized by the White Act, because it is patently not a conservation measure and because it plainly violates Section 1 of the White Act, which forbids the granting of any "exclusive or several right of fishery" by granting an exclusive right of fishery to the Karluk Indians and their permittees. They have at all times urged that the drastic penal and seizure provisions of a fishery conservation statute can in no event be employed to enforce an asserted Indian reservation under an entirely different statute.

On the basis of these facts, the District Court found that respondents would suffer a substantial and irreparable loss without an adequate remedy at law if petitioner were to prevent them from fishing in the waters in question (R. 35). Respondents would have to close their Kodiak canneries were their boats, gear and equipment seized (R. 36), and the threat of arrest and imprisonment would have kept their crews out of these waters (R. 36).

On the basis of these Findings of Fact the District Court concluded as a matter of law (R. 39-40) that (1) Public Land Order 128 is invalid insofar as it covers ocean waters; (2) that Section 208.23(r) is null and void; and (3) that a permanent injunction should be granted.

The court below affirmed the decree on November 21, 1947 (R. 515). It held that the Secretary of the Interior was not authorized by Section 2 of the Act of May 1, 1936 to create the reservation in ocean waters below low water mark. The court reviewed the history of non-monopoly policy in Alaskan fisheries; pointed out that the Secretary's action gave 57 adults a complete monopoly (except for such rights as they might sell) in waters which yielded in 1946 almost 4,000,000 sal-